



**[6450-01-P]**

## **DEPARTMENT OF ENERGY**

### **Policy Statement Regarding Long-Term Authorizations to Export Natural Gas to Non-Free Trade Agreement Countries**

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Policy statement.

**SUMMARY:** The Department of Energy (DOE) stands behind the long-term authorizations it has issued under the Natural Gas Act, approving the export of natural gas (including liquefied natural gas) to non-free trade agreement countries. DOE is firmly committed to the durability and stability of the non-FTA export authorizations it has granted to date, and to any export authorizations issued by DOE in the future.

**DATES:** This policy statement is applicable on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** Amy Sweeney, U.S. Department of Energy (FE-34), Office of Regulation and International Engagement, Office of Fossil Energy Forrestal Building, Room 3E-042, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586-2627; or Cassandra Bernstein or Ronald (R.J.) Colwell, U.S. Department of Energy (GC-76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D-033, 1000 Independence Ave. SW., Washington, DC 20585; (202) 586-9793 or (202) 586-8499.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. Statutory Background**

The Department of Energy (DOE), Office of Fossil Energy (FE), is responsible for authorizing exports of domestically produced natural gas, including liquefied natural gas (LNG), to foreign nations pursuant to section 3 of the Natural Gas Act (NGA).<sup>1</sup> Under section 3(a) of the NGA, DOE/FE reviews applications to export natural gas to countries with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (non-FTA countries).<sup>2</sup> NGA section 3(a) states that DOE “shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.”<sup>3</sup> DOE has consistently interpreted this provision as creating a rebuttable presumption that a proposed export of natural gas is in the public interest.<sup>4</sup> Accordingly, DOE will conduct an informal adjudication and grant an application to export LNG to non-FTA countries under NGA section 3(a) unless DOE finds that the proposed exportation will not be consistent with the public interest.<sup>5</sup> Additionally, under section 16 of the NGA,

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<sup>1</sup> 15 U.S.C. 717b.

<sup>2</sup> This policy statement applies to authorizations to export natural gas to non-FTA countries under section 3(a) of the NGA, 15 U.S.C. 717b(a) (non-FTA authorizations). With regard to exports to FTA countries, NGA section 3(c) was amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102-486) to require that FTA applications “shall be deemed to be consistent with the public interest” and granted “without modification or delay.” 15 U.S.C. 717b(c).

<sup>3</sup> 15 U.S.C. 717b(a).

<sup>4</sup> See *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) (“We have construed [NGA section 3(a)] as containing a ‘general presumption favoring [export] authorization.’”) (quoting *W. Va. Pub. Servs. Comm’n v. U.S. Dep’t of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

<sup>5</sup> Before reaching a final decision on any non-FTA application, DOE must also comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* See, e.g., *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, FE Docket No. 17-79-LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Eagle Maxville Facility in Jacksonville, Florida, and Exported by Vessel to Free Trade Agreement and Non-Free Trade Agreement Nations, at 34-37 (Sept. 15, 2017).

DOE is authorized to “prescribe, issue, make, amend, and rescind such [export] orders ... as it may find necessary or appropriate...” to satisfy its statutory responsibilities.<sup>6</sup>

## **B. Regulatory Background**

To date, DOE/FE has issued 29 final long-term authorizations to export LNG and compressed natural gas to non-FTA countries in a cumulative volume totaling 21.35 billion cubic feet per day of natural gas (approximately 7.79 trillion cubic feet per year).<sup>7</sup> Each of these authorizations has a term of 20 years, with additional time provided for LNG export operations to commence. In each authorization, DOE/FE has included a statement acknowledging its authority under NGA section 16 to “make, amend, and rescind such [export] orders ... as it may find necessary or appropriate ....” to satisfy its statutory responsibilities.<sup>8</sup>

In these authorizations, DOE has stated that “[s]ome commenters [have] asked DOE to clarify the circumstances under which the agency would exercise its authority to revoke (in whole or in part) previously issued LNG export authorizations.”<sup>9</sup> In response, DOE has stated that it “cannot precisely identify all the circumstances under which such action would be taken.”<sup>10</sup> DOE has maintained, however, that “[i]n the event of any unforeseen developments of such significant consequence as to put the public interest at risk, DOE/FE is fully authorized to take action as necessary to protect the public interest.”<sup>11</sup>

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<sup>6</sup> 15 U.S.C. 717o.

<sup>7</sup> 15 U.S.C. 717b(a); see *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 34-37.

<sup>8</sup> *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 33 n.98 (quoting 15 U.S.C. 717o); see also *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 33 n.45 (quoting 15 U.S.C. 717o) (May 20, 2011).

<sup>9</sup> *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 33 n.98.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (quoting *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, at 33 n.45).

DOE/FE has never rescinded a long-term non-FTA export authorization for any reason. Further, DOE has no record of ever having vacated or rescinded an authorization to import or export natural gas over the objections of the authorization holder.<sup>12</sup>

DOE has rescinded (or “vacated”) one long-term LNG export authorization to FTA countries (*see supra* note 2)—DOE/FE Order No. 3482, issued to Louisiana LNG Energy LLC (LLNG) on August 28, 2014.<sup>13</sup> DOE/FE vacated this order in 2017 on the basis of LLNG’s own prolonged inaction, after LLNG effectively self-terminated its proposed LNG export project.<sup>14</sup> Specifically, LLNG: (i) failed to participate in its on-going FERC process, such that FERC terminated LLNG’s pre-filing review process;<sup>15</sup> and (ii) failed to comply with its DOE/FE reporting obligations under the terms of its FTA order, for a period of more than 18 months.<sup>16</sup> Throughout this 18-month time period, DOE/FE made repeated efforts to contact LLNG, with no success.<sup>17</sup> Even after DOE/FE issued an Order to Show Cause—inviting LLNG to respond and explain the circumstances—LLNG took no action.<sup>18</sup> The evidence clearly showed that LLNG neither wished to move forward with its proposed LNG export facility nor to maintain its FTA

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<sup>12</sup> See Ltr. from Paula Gant, U.S. Dep’t of Energy, to Sen. Lisa Murkowski, at 1 (Oct. 17, 2013), *available at*: [https://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=9E99E412-CE05-449D-8893-DC8D64C32D02](https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=9E99E412-CE05-449D-8893-DC8D64C32D02) (last viewed June 8, 2018).

<sup>13</sup> *Louisiana LNG Energy LLC*, DOE/FE Order No. 3482, FE Docket No. 14-19-LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Louisiana LNG Energy Project in Plaquemines Parish, Louisiana, to Free Trade Agreement Nations (Aug. 28, 2014).

<sup>14</sup> See *Louisiana LNG Energy LLC*, DOE/FE Order No. 3482-A, FE Docket Nos. 14-19-LNG & 14-29-LNG, Order Vacating Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel to Free Trade Agreement Nations and Dismissing Application to Export Liquefied Natural Gas by Vessel to Non-Free Trade Agreement Nations, at 2-4 (July 24, 2017); *see also Louisiana LNG Energy LLC*, FE Docket Nos. 14-19-LNG & 14-29-LNG, Order to Show Cause, at 2-5 (June 12, 2017).

<sup>15</sup> See Letter from Ann Miles, Director of FERC’s Office of Energy Projects, to Martin Houston, Chairman of LLNG, Re: Pre-Filing Review Termination of the Mississippi River LNG Project, FERC Docket No. PF14-17-000 (Dec. 13, 2016) (FERC observing that LLNG “has not filed the application needed for staff to continue the environmental review of [the] project”), *cited in Louisiana LNG Energy LLC*, DOE/FE Order No. 3482-A, at 3 n.9.

<sup>16</sup> See *Louisiana LNG Energy LLC*, DOE/FE Order No. 3482-A, at 2-3.

<sup>17</sup> See *id.* at 3.

<sup>18</sup> See *Louisiana LNG Energy LLC*, Order to Show Cause, at 5 (providing 30 days for LLNG to show cause, in writing, why its authorization should not be vacated—to which LLNG never responded); *Louisiana LNG Energy LLC*, DOE/FE Order No. 3482-A, at 3.

authorization.<sup>19</sup> DOE/FE therefore vacated LLNG's FTA authorization under NGA section 16, but it did so without objection by LLNG and without prejudice to LLNG, should LLNG wish to seek an export LNG authorization in the future.<sup>20</sup>

The LLNG proceeding was a highly unusual scenario where all evidence indicated that the company was no longer pursuing its proposed LNG export project and had, in fact, ceased to exist as a commercial operation. In vacating LLNG's FTA order without prejudice, DOE responded appropriately in both implementing its statutory authority under NGA section 16 and in upholding the integrity of its natural gas regulatory program under 10 CFR Part 590.

## **II. DOE/FE Policy on Non-FTA Export Authorizations**

Potential importers of U.S. LNG and financiers of LNG export projects (collectively, interested stakeholders) have expressed concern about DOE/FE rescinding one or more non-FTA export authorizations in the future. In raising this concern, they point to the language in the existing non-FTA authorizations (quoted above) in which DOE/FE has observed its authority under NGA section 16 to "make, amend, and rescind such [export] orders ... as it may find necessary or appropriate ...." Citing DOE/FE's language, they have asked what potential "developments" in the U.S. LNG market could rise to the level of "such significant consequence as to put the public interest at risk"—such that DOE would unilaterally rescind one or more non-FTA export authorizations or take other action to protect the public interest under NGA section 3(a).

As a preliminary matter, DOE/FE wishes to allay concerns about the security of existing (or future) non-FTA export authorizations. In this policy statement, DOE/FE affirms its commitment to all export authorizations issued under the NGA, including long-term

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<sup>19</sup> See *Louisiana LNG Energy LLC*, DOE/FE Order No. 3482-A, at 3-4.

<sup>20</sup> See *id.* at 4 (also dismissing LLNG's pending non-FTA application without prejudice).

authorizations approving the export of LNG to non-FTA countries. As indicated above, DOE/FE currently has issued 29 final non-FTA export authorizations, based on a thorough consideration of the public interest under section 3(a) of the NGA. In each of these proceedings, DOE/FE reviewed a substantial administrative record addressing factors including economic impacts, international impacts, security of natural gas supply, and environmental impacts, among others. In granting each application, DOE/FE concluded that exports of U.S. LNG will generate net economic benefits to the broader U.S. economy and will provide energy security and environmental benefits to the global community (including emerging economies presently reliant upon more carbon intensive fuels).<sup>21</sup>

DOE/FE stands firmly behind these factual findings and legal conclusions—many of which have been challenged and upheld in federal court.<sup>22</sup> Authorization holders, as well as any interested stakeholders, thus should have the utmost confidence in the validity of DOE/FE's LNG export authorizations for the full term of each non-FTA order. Indeed, as noted above, DOE has never rescinded a non-FTA export authorization for any reason. DOE has vacated one FTA order under NGA section 16, but the circumstances of that proceeding were based solely on the inaction of the authorization holder.<sup>23</sup>

As a matter of law, DOE preserves its authority to take action as necessary or appropriate to carry out its duties under the NGA.<sup>24</sup> However, DOE does not foresee a scenario where it would rescind one or more non-FTA authorizations. The United States government takes very seriously the investment-backed expectations of private parties subject to its regulatory

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<sup>21</sup> See, e.g., *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 23-38.

<sup>22</sup> In 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued four decisions upholding non-FTA export authorizations issued by DOE/FE under NGA section 3(a). See, e.g., *Sierra Club vs. U.S. Dep't of Energy*, 867 F.3d 189; *Sierra Club v. U.S. Dep't of Energy*, Nos. 16-1186, 16-1252, 16-1253, 703 Fed. Appx. 1 (D.C. Cir. Nov. 1, 2017).

<sup>23</sup> See *supra* at 4-5.

<sup>24</sup> 15 U.S.C. 717o.

jurisdiction. In particular, DOE understands the far-ranging economic investments and natural gas supply commitments associated with these authorizations over their full term—affecting both U.S. and global interests. DOE emphasizes that it remains committed to the durability and stability of the export authorizations it has granted under the NGA, as well as to supporting the approved export of U.S. natural gas around the world.

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Steven E. Winberg  
Assistant Secretary  
Office of Fossil Energy

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